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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES MONTGOMERY and DONALD HUBERT,

Petitioners,

v.

JAMES AURIEMMA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether government defense attorneys, like government prosecutors, are entitled to absolute immunity from a civil damages suit for all conduct undertaken as part of their representation of their public client in pending litigation.

LIST OF PARTIES

The caption identifies all petitioners. The respondents to this petition are:

John Auriemma, Daniel Coll, Marshall Considine, Renaldo Cozzi, Kenneth Curin, Russell Ditusa, Thomas Faragoi, John Hinchy, Kathryn Kajari, George Marcin, Patrick McDonough, John Rafter, Dominic Rizzi, James Stampnick, Thomas Walton, and Roger Whalen.

Fred Rice, who was sued individually and as Superintendent of the Chicago Police Department, and Investigative Consultants, Inc. were defendants in the underlying case but are not parties to this action and were not parties to the appeal from which this writ of certiorari is sought.

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v.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, James Montgomery and Donald Hubert, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit issued in the above-entitled proceeding on October 21, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 860 F.2d 273, and is reprinted in the appendix hereto, pp. 1a-14a, *infra*.

The minute order announcing the decision of the United States District Court for the Northern District of Illinois (Leinenweber, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 17a, *infra*.

JURISDICTION

The judgment and opinion of the Seventh Circuit Court of Appeals affirming the District Court's order denying absolute immunity to petitioners was entered on October 21, 1988. The Court of Appeals denied petitioners' timely petition for rehearing on December 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondents John Auriemma, et al., initiated this litigation under 15 U.S.C. § 1681 alleging that the petitioners, who are government attorneys, violated the Fair Credit Reporting Act while defending the City of Chicago and various City officials in an earlier employment discrimination lawsuit brought by respondents. In their complaint, respondents alleged that while their earlier lawsuit, *Auriemma v. City of Chicago*, No. 84 C 1224 (N.D. Ill.) ("Auriemma I"), and a related suit, *Maloney v. Washington, et al.*, No. 84 C 0689 (N.D. Ill.), were pending, Montgomery and Hubert asked private investigators to obtain credit reports about them from a credit reporting agency

"under false pretenses." (R.40 at ¶¶ 27, 28) This was allegedly part of a plan to disclose the financial information publicly in order to embarrass them and retaliate against them for filing their earlier lawsuit. (*Id.* at ¶¶ 27, 33) The investigators allegedly obtained those credit reports during December, 1984 and January, 1985 and gave them to Hubert and Montgomery and to the Superintendent of Police, Fred Rice. (*Id.* at ¶¶ 30, 34)

Petitioners moved to dismiss this action, claiming that because all of their alleged misconduct occurred while they were acting as government attorneys defending their public clients against pending litigation, they were absolutely immune from suit. (R. 15) On December 23, 1987, the District Court denied their motion to dismiss by a minute order which was docketed on December 28, 1987. Petitioners filed a notice of appeal on January 12, 1988 pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985), seeking review of the denial of their claim to absolute immunity. In a judgment and opinion dated October 21, 1988, the Seventh Circuit Court of Appeals agreed with the District Court, and held that petitioners were not entitled to absolute immunity. The court stated that since the alleged misconduct was investigatory in nature, and occurred allegedly outside the federal rules of discovery, it was "removed from the judicial process and [is] not a function that rests uniquely within the duties of an advocate." *Auriemma v. Montgomery*, 860 F.2d 273, 278 (7th Cir. 1988).

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This case squarely presents an issue of fundamental importance and urgency to all government defense counsel: whether a government defense attorney, like a government prosecuting attorney, is absolutely immune for conduct, including investigative conduct, undertaken on behalf of a public client in pending litigation. The Seventh Circuit concluded that because the claimed misconduct here was an investigation, alleged to have occurred outside the federal rules of discovery, it was not so intimately connected to the judicial process as to fall "uniquely within the duties of an advocate" and merit absolute immunity. *Auriemma v. Montgomery*, 860 F.2d 273, 278, 280 (7th Cir. 1988).

In two respects, this opinion departs significantly from the opinions of this Court and other circuits. First, the bright line the court drew at investigations occurring during litigation but outside the rules of discovery is a novel one. Neither this Court, nor the circuit courts, when discussing the scope of immunity available to government attorneys, have considered court rules to be a relevant, let alone determinative, factor. Instead, courts have considered whether the investigative activity was done in furtherance of pending proceedings or in anticipation of the commencement of legal proceedings. Where proceedings were pending or a specific target identified, all conduct related to those proceedings has been immunized. Drawing the line for immunity around the federal rules of discovery, and excluding other activities that legitimately and routinely are part of the attorney's preparation of his

client's case, is a dangerous narrowing of immunity and will damage, rather than promote, the public concerns that initially gave rise to the doctrine of absolute immunity for public attorneys.

Second, the Seventh Circuit raises a question of whether government defense attorneys are materially different from prosecuting attorneys so as to merit a different, and more limited, absolute immunity. On the one hand, the court expressly acknowledged, following the lead of this Court, that the reasons for affording prosecuting attorneys absolute immunity apply equally to all government attorneys, 860 F.2d at 276. *See also Briscoe v. LaHue*, 460 U.S. 325, 334-35 (1983); *Forrester v. White*, 108 S. Ct. 538, 543 (1988); *Butz v. Economou*, 438 U.S. 478, 512 (1978). Indeed, throughout the opinion, the court simply discussed the question of absolute immunity for "government attorneys" without distinguishing further. Yet, at the end of the opinion, the court cracked open Pandora's box when it stated, "we express no opinion on whether, under similar circumstances, the unique functions performed by prosecuting attorneys would entitle them to greater immunity than that afforded government defense counsel." 860 F.2d at 280.

This is the first case to deny government defense attorneys absolute immunity for conduct alleged to have been undertaken in the course of representing their public client. As a practical matter, the Seventh Circuit has created a new and different test for granting absolute immunity to defense attorneys than to prosecuting attorneys. Certiorari is thus necessary to clarify the parameters of absolute immunity available to all government attorneys.

A. THE DECISION OF THE SEVENTH CIRCUIT LIMITING THE AVAILABILITY OF ABSOLUTE IMMUNITY TO INVESTIGATIVE CONDUCT FALLING WITHIN THE FEDERAL RULES OF DISCOVERY CONFLICTS WITH THE REASONING OF THIS COURT AND WITH THE DECISIONS OF OTHER CIRCUITS.

The alleged attorney misconduct at issue in this case was investigative in nature—gathering facts that could be used to prove or disprove the opponents' claims of injury. The question of whether investigative conduct, as opposed to other forms of trial preparation, is shielded by absolute immunity, has been discussed frequently by this Court and others. As noted above, the conclusion of the Seventh Circuit here that only those investigations that are undertaken within the federal rules of discovery are protected, is entirely novel.

For example, the Second Circuit granted immunity to one public defense attorney but denied it to other public attorneys based solely on whether the alleged misconduct was undertaken as part of the attorney's representation of a public client in pending litigation. *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986). In that case, the survivor of a patient in a mental hospital sued an Assistant Attorney General of the State of New York as well as certain federal attorneys. Her claim was that her father had been injected with a mescaline derivative without his knowledge and against his will as part of a military experiment on the efficacy of the substance as a chemical-warfare agent. The injections ultimately caused his death. Her mother, on behalf of the deceased's estate, had sued the State of New York for negligence in the death of her father, and the Assistant Attorney General and the federal attorneys allegedly conspired to conceal from the estate the full truth about the military's program and its role in causing the man's death. The earlier case was

settled for a small sum of money. When the facts later became known, the daughter brought the second suit.

No one will dispute that the alleged misconduct of the government attorneys in *Barrett* was much more serious than the alleged misconduct here, where the claim is simply that the attorneys in preparing their case conspired to obtain a credit report on the plaintiffs under false pretenses. Yet the Second Circuit did not hesitate to shield the state's attorney from liability because "his sole involvement was at all times as Assistant Attorney General of the State of New York representing that state as its attorney in the action brought by the [deceased's estate] against it in the Court of Claims for damages. . . ." 798 F.2d at 573. The federal attorneys, on the other hand, had no litigation pending against their client at the time they actively concealed evidence, and hence they were not immunized.

Barrett is in accord with a unanimous string of cases concerning prosecutors in which courts, relying on the reasoning of this Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976), have drawn a protective line around the attorney's function as an advocate in pending litigation. In *Imbler*, 424 U.S. at 430 n.33, this Court recognized that some investigations conducted by a prosecutor are performed "in his role as an advocate," entitling him to absolute immunity, while other investigations are performed "as an administrator rather than as an officer of the court." In none of the decisions following *Imbler* did the courts discuss the availability of immunity in connection with formal discovery rules. *See, e.g., Freeman on Behalf of the Sanctuary v. Hittle*, 708 F.2d 442, 443 (9th Cir. 1983) ("Investigative functions carried out pursuant to the preparation of a prosecutor's case also enjoy absolute immunity."); *Simons v. Bellinger*, 643 F.2d 774, 784-85 (D.C.

Cir. 1980) (immunity attaches to investigative conduct once prosecutorial activity focuses on a particular target); *Cook v. Houston Post*, 616 F.2d 791, 793 (5th Cir. 1980) (investigations pertaining to a particular prosecution immunized); *Hampton v. Hanrahan*, 600 F.2d 600, 616-18, 632-33 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980) (prosecutor's investigative "raid" order prior to filing of criminal charges not absolutely immune; however, prosecutors' post-charge investigation of testimony, in which prosecutors deliberately prepared false testimony, entitled to absolute immunity; discovery rules irrelevant to analysis); *Daniels v. Kieser*, 586 F.2d 64, 68 (7th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979) (court granted absolute immunity to prosecutor allegedly involved in unlawful post-indictment conduct without mentioning discovery rules; rather, court observed that investigative misconduct occurring "before an indictment has been brought" is not entitled to absolute immunity); *Stokes v. City of Chicago*, 660 F. Supp 1459 (N.D. Ill. 1987) (prosecutors' attempt to create perjured testimony during pending prosecution protected by absolute immunity; attempt to influence testimony was unconnected to discovery); *Maxfield v. Thomas*, 557 F. Supp. 1123, 1129 (D. Idaho 1983) (prosecutor's unconstitutional investigative search conducted after the filing of a criminal complaint, expressly distinguished from a pre-complaint search, absolutely immunized; no mention of discovery rules); *DeBoer v. Martin*, 537 F. Supp. 1159, 1162-63 (N.D. Ill. 1982) (unlawful arrest of witness during pending prosecution protected by absolute immunity; no discovery involved).

The cases in which courts have refused to afford absolute immunity to government prosecutors on the principle that they were engaged in "administrative or investigative acts" all involved investigations that occurred before the

initiation of legal proceedings. *See, e.g., Hamilton v. Daley*, 777 F.2d 1207, 1213 n.3 (7th Cir. 1985) (prosecuting attorney's investigation entitled to only qualified immunity because it was conducted prior to the "judicial phases of [the] criminal proceedings"); *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987) (no absolute immunity for unlawful prosecutorial interrogation prior to the filing of a criminal complaint; however, when a prosecuting attorney is an "advocate," absolute immunity applies; court cited *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), which defined "advocate" as a "participant" in the judicial process and reasoned that once judicial proceedings have commenced, absolute immunity should attach); *Barbera v. Smith*, 836 F.2d 96 (2d Cir. 1987), *cert. pending*, (denying absolute immunity to pre-litigation investigations); *Powers v. Coe*, 728 F.2d 97 (2d Cir. 1984) (illegal wiretap not immunized; no pending indictment); *Marrero v. City of Hialeah*, 625 F.2d 499, 505 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981) (investigation prior to indictment not absolutely immunized).

The critical significance of the pendency of the legal proceedings was explained by the District of Columbia Court of Appeals in *Gray v. Bell*, 712 F.2d at 499-501. There, the court reasoned that absolute immunity is most appropriate after the commencement of legal proceedings because at that point the government attorney is most in need of making independent, discretionary judgments, the risk of vexatious litigation against the government attorney is the highest, and the checks against the possibility of an attorney's abusive conduct are most extensive. That court, like all others, placed no significance on the role of the discovery or other court rules. *See generally Gray*, 712 F.2d at 499-501.

In sum, it is the pendency of litigation, and not discovery or other court rules, that renders the defense of absolute immunity available to public attorneys. The opinion at issue here thus represents a troubling departure from the mainstream of legal thought on this issue. The only factor that appears to distinguish the case at bar from other cases where investigative conduct was challenged, is that the attorneys here were defending the government rather than prosecuting on its behalf. As shown below, whatever scope of immunity is appropriate, it must be made available equally to government defense and prosecuting attorneys.

B. BY TREATING GOVERNMENT DEFENSE ATTORNEYS DIFFERENTLY THAN PROSECUTING ATTORNEYS, THE SEVENTH CIRCUIT CREATED A CONFLICT WITH THE REASONING OF THIS COURT AND DECISIONS OF OTHER CIRCUITS.

As noted above, the Seventh Circuit as a practical matter has now treated government defense attorneys differently than it and other courts have previously treated prosecuting attorneys. Such differential treatment ignores this Court's understanding that absolute immunity is "necessary to assure that . . . *advocates* . . . can perform their respective functions without harassment or intimidation." *Butz v. Economou*, 438 U.S. at 512, quoted in *Barrett v. United States*, 798 F.2d at 572 (emphasis supplied therein). This Court has identified several factors for determining whether absolute immunity applies: (1) whether there was a historical or common law basis for granting the particular public official immunity; (2) whether performing the particular public function poses special risks of vexatious litigation, and (3) whether sufficient safeguards exist to prevent abuses of power. *Mitchell*

v. Forsyth, 472 U.S. 511, 521-23 (1985), cited in *Auriemma v. Montgomery*, 860 F.2d at 275. *See also Barrett v. United States*, 798 F.2d at 572-73. The Seventh Circuit discussed all of these factors, conceding that two other circuits have concluded these factors mandate absolute immunity for defense attorneys. *See Auriemma v. Montgomery*, 860 F.2d at 275-277, discussing *Ellison v. Stephens*, 581 F.2d 584 (6th Cir. 1978); *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986); also discussing *Skolnick v. Hanrahan*, 398 F.2d 27 (7th Cir. 1968).

In *Barrett*, the Second Circuit rejected decisively the argument that defense attorneys ought to be afforded less immunity than prosecutors. Discussing *Butz v. Economou*, the Second Circuit noted that this Court had granted government officials who initiate administrative proceedings as well as those government attorneys who introduce evidence and cross-examine witnesses at such proceedings the same protection as prosecutors because "otherwise such attorneys 'might hesitate to bring forward some witness or documents' for fear that the proof might turn out to be false, subjecting them to liability." 798 F.2d at 572, citing *Butz*, 438 U.S. at 517. The court went on:

> In our view the same principles should *a fortiori* govern the government attorney's initiation of civil litigation in a state or federal court. The controversial nature of the proceeding, the risk that a losing civil defendant will seek to retaliate by a suit attacking the propriety of the government attorney's conduct, and the existence of alternative safeguards against the attorney's misconduct, (e.g., professional disciplinary proceedings, discovery and cross-examination) militate in favor of absolute immunity.
>
> It is urged that these factors do not call for the same result when the government attorney *defends* a civil suit. We disagree.

798 F.2d at 572 (emphasis supplied). Noting that in civil cases, as well as criminal ones, " 'there is, if not always a winner, at least one loser,' *Mitchell v. Forsyth*, 105 S.Ct. at 2813," the Second Circuit concluded that since the government defense attorney "is charged with a public trust he should not be inhibited in the faithful performance of his duties by the threat of harassing lawsuits against him." *Barrett*, 798 F.2d at 572. The Second Circuit was absolutely correct in concluding that there is no basis in law or in fact to distinguish between government defense and prosecuting attorneys.

1. Government defense attorneys face the same risk of vexatious litigation as prosecutors face.

Government prosecutors are protected by absolute immunity because the risk of vexatious litigation during a pending prosecution would undermine their vigorous advocacy in prosecuting criminal defendants and thereby injure their ability to protect the public. *Imbler*, 424 U.S. at 423, 424-26. Government defense attorneys are equally subject to personal suits for their litigation conduct, and the danger of such suits poses the same risk of negative consequences for the public.

First, the hostility a criminal defendant feels against the prosecutor is similar to the hostility a civil plaintiff, waging a suit for the recovery of thousands if not millions of dollars, feels against the government defense attorney. A criminal defendant resents prosecutors because the defendant is threatened with an impending deprivation of liberty or property. Similarly, a civil plaintiff who sues a public entity believes that the government has already deprived him of his property, as in a wrongful discharge suit, or his liberty, as in a suit for unlawful arrest or imprisonment. He will therefore just as strongly resent the

government defense attorney whom he believes is wrongly defending that deprivation of liberty or property.

Second, the injury to the public from subjecting prosecutors to suit is similar to the injury the public faces when government defense attorneys are subject to suit. Baseless—though burdensome—lawsuits filed against attorneys who defend the government can only undermine the thoroughness and zeal with which those attorneys defend police officers and other government officials wrongly accused of unlawful conduct. If police officers and other officials cannot count on a vigorous defense, they, in turn, will be reluctant to put themselves on the line for the public. Absolute immunity is thus as essential for government defense attorneys as for prosecuting attorneys.

The Seventh Circuit appeared to believe that there is less risk of vexatious litigation against government defense attorneys than prosecutors because of plaintiffs' misleading contention that there are only three cases where defense attorneys have been sued. 860 F.2d at 280. This is simply incorrect. The "three cases" the court referred to were those cases in which the absolute immunity defense was addressed by an appellate court in a published opinion. In truth, there have been many cases filed against government defense attorneys in the City of Chicago's office of the Corporation Counsel alone for their litigation activity. Judicial notice may be taken of the following sample of cases, all of which arose out of conduct related to pending litigation. *See, e.g., Prince Saud v. City of Chicago,* No. 86 C 1837 (N.D. Ill.) (one attorney sued; action dismissed per Leinenweber, J.); *Kinzer v. City of Chicago,* No. 82 L 50192 (Cir. Ct. Cook County) (two attorneys sued in third-party action; action stayed pending outcome of main action); *Hinchy v. City of Chicago,* No. 88 C 6873 (N.D. Ill., Williams, J., pre-

siding) (one attorney sued); *Arnold v. City of Chicago*, No. 86 C 6640 (N.D. Ill., Duff, J., presiding) (one attorney sued); *Sampson v. Daniels*, No. 86 C 0014 (one attorney sued; case dismissed per Getzendanner, J., aff'd on appeal, No. 86-1840); *Maloney v. Rice*, No. 86 C 6026 (N.D. Ill., Leinenweber J., presiding) (one attorney sued); *Auriemma v. Montgomery*, No. 86 C 9260 (N.D. Ill., Leinenweber, J., presiding) (two attorneys sued). Thus, the risk of vexatious litigation is quite real.

2. As with prosecutors, the defense of qualified immunity is insufficient to protect government defense attorneys from the hazards of vexatious litigation.

The Seventh Circuit also has suggested that qualified immunity is sufficient to protect government defense attorneys from the burdens of defending against these harassing suits. 860 F.2d at 279-80. However, the fundamental problem with limiting a government attorney to a qualified immunity defense is that the determined, resentful litigant can artfully—and falsely—allege that a government lawyer has violated some clearly established right. This eliminates the qualified immunity defense and requires the attorney to defend the suit on the merits. While the wrongly sued attorney may seek sanctions against such a litigant under Fed. R. Civ. P. 11 or 28 U.S.C. § 1927, this remedy is available only *after* the defense of the suit. Absolute immunity, on the other hand, spares government attorneys the burdens of a separate, personal suit for damages arising out of the manner in which they have discharged their public defense duties. Thus, qualified immunity is insufficient. *Accord Imbler*, 424 U.S. at 424-26 (for similar reasons, qualified immunity is intrinsically inadequate protection for prosecutors).

3. Government defense attorneys are subject to the same checks against abuse of their authority during the pendency of litigation as are government prosecutors.

The Seventh Circuit has also reasoned that investigative conduct occurring during the pendency of litigation but not conducted "under the rules of civil procedure" is not subject to adequate checks upon abuse of authority. 860 F.2d at 278-79. This is not correct. The checks available to deter an attorney's misbehavior, including criminal prosecution, professional censure, and orders entered by the presiding judge under the "All Writs Act," 28 U.S.C. § 1651, are equally available throughout the entire pendency of litigation, not just during the civil discovery phase. Moreover, a judge presiding over a pending court action always has the power to impose criminal and civil sanctions for contempt of his own orders under 18 U.S.C. § 401. It was precisely the availability of such checks as professional censure and criminal punishment that persuaded this Court to provide absolute immunity to prosecutors in *Imbler v. Pachtman*, 424 U.S. at 429.

The Seventh Circuit ignored *Imbler* apparently because it assumed that unless a government attorney's investigation occurs in the course of civil discovery, the subject of the investigation is unlikely to know that his rights have been violated and therefore will be unable to avail himself of those checks. *See* 860 F.2d at 279. Even assuming the premise were correct, the "likelihood of the victim knowing his rights have been violated" has never been the relevant inquiry for absolute immunity. This Court and others have not hesitated to accord absolute immunity for unconstitutional conduct deliberately designed to remain a secret to the victim. For example, in *Imbler*, and in *Heidelberg v. Hammer*, 577 F.2d 429, 432

(7th Cir. 1978), the prosecutors were given absolute immunity even though they were alleged to have destroyed, suppressed and falsified evidence. Similarly, in *Barrett v. United States*, 798 F.2d 565, 573 (2d Cir. 1986), as already noted, the government defense attorney was given absolute immunity from a claim that he had suppressed relevant evidence showing that the federal government was involved in unlawful drug experiments.

In any event, in this case, the plaintiffs were well aware of the attorneys' allegedly unlawful investigation of them since they initiated this suit while their first lawsuit against the City of Chicago was still pending. These plaintiffs could have easily sought relief from the presiding judge, rather than initiate this separate lawsuit.

In sum, government defense attorneys face the same risks and are subject to the same checks as prosecutors. Therefore, they are entitled to the same protection.

C. THIS CASE PRESENTS ISSUES OF CRITICAL IMPORTANCE TO THE PUBLIC BAR.

As discussed above, certiorari should be granted to review the Seventh Circuit's opinion because it departs radically from the reasoning of this Court and the decisions of other courts, notably the Second Circuit. The issues at stake here are of vital importance to the functioning of the public sector of the bar. It is critical that competent and enthusiastic attorneys be recruited to work in the public sector and that they be encouraged to make a career there, so that federal, state and local government receive quality representation on the many key issues of our day involving governmental interests.

It is well known that the financial remuneration available for public sector attorneys does not match that of

the private sector. *See generally* Castle, *Government Lawyers Generally Are Underpaid*, A.B.A. J., March, 1985, at 134. Added to low pay is the very real danger, discussed in Section B above, that by representing the government the attorney becomes exposed to vexatious litigation. Absolute immunity is one way the public acknowledges the risks facing public attorneys and encourages them to be vigorous in representing the public interest.

The reassurance that the public understands the risks of public service and will protect those who undertake it, must be afforded to both defense and prosecuting attorneys alike. As discussed above, there is neither precedent nor logic for treating defense attorneys differently than prosecuting attorneys and, indeed, the negative consequences that may flow from the Seventh Circuit's opinion of making defense attorneys into "second-class citizens" in relation to prosecutors could be substantial.

In addition, the Seventh Circuit's opinion, if left unaltered, may have a significant chilling effect on the way public attorneys prepare their client's case. If only those activities that fall within the scope of formal discovery rules are protected, attorneys may refrain from performing the many other necessary and routine functions that fall outside discovery rules. For example, the preparation of every case where personal injury or financial loss is alleged requires some investigation, whether that involves sending an investigator to see if the person claiming to be permanently disabled is at home mowing his lawn, or whether the person who claims to be unemployed, in fact holds down two jobs. These types of activities may be the most valuable and cost-effective way to prepare one's case. *See, e.g.* Robert L. Simmons, *Winning Before Trial: How to Prepare Cases for the Best Settlement or Trial*

Result (1974). Certainly, the formal discovery process is only one weapon in the careful lawyer's arsenal for preparing his case.

In sum, all government lawyers should be encouraged to apply vigorously all litigation tools on behalf of their public clients. Accordingly, this Court should grant certiorari to review this matter.

CONCLUSION

For all the foregoing reasons, defendants Montgomery and Hubert respectfully request that this Court grant a Petition for a Writ of Certiorari to the Seventh Circuit to review this case.

Respectfully submitted,

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February 28, 1989

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-1072

JOHN AURIEMMA, et al.,

Plaintiffs-Appellees,

v.

JAMES MONTGOMERY and
DONALD HUBERT,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86-C-9260—**Harry D. Leinenweber,** *Judge.*

ARGUED MAY 18, 1988—DECIDED OCTOBER 21, 1988

Before WOOD and MANION, *Circuit Judges,* and ESCHBACH, *Senior Circuit Judge.*

MANION, *Circuit Judge.* Plaintiffs filed a civil suit against several defendants, including two municipal attorneys, alleging violations of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 through § 1681t. The municipal attorneys filed a motion to dismiss plaintiffs' claims against them, contending that they were absolutely immune from suit. The district court denied their motion. We affirm.

I.
NATURE OF THE CASE

This FCRA action arises out of two lawsuits filed by current or former members of the Chicago Police Department against the City of Chicago and various city officials. The first lawsuit, *Maloney v. Washington et al.*, No. 84 C 0689 (N.D. Ill. filed Jan. 25, 1984), was filed by a single plaintiff, William Maloney. Maloney alleged that he had been unlawfully discriminated against on the basis of his race and political affiliation. He further alleged that several other members of the police department had been victims of unlawful employment practices and, like Maloney, had suffered financial harm as a result. James Montgomery, Corporation Counsel for the City of Chicago, and Donald Hubert, Special Assistant Corporation Counsel, entered appearances on behalf of the City of Chicago and the defendant city officials.

Approximately two weeks after Maloney filed suit, many of the persons named in Maloney's complaint as having suffered from unlawful employment practices also sued the City of Chicago and various city officials. This suit, *Auriemma et al. v. City of Chicago et al.*, No. 84 C 1224 (N.D. Ill. filed Feb. 8, 1984) (*Auriemma I*), filed on behalf of eighteen plaintiffs, alleged that the plaintiffs' First and Fourteenth Amendment rights had been violated. James Montgomery filed an appearance on behalf of the defendants. The district court subsequently consolidated the *Maloney* and *Auriemma I* cases for discovery purposes.

Based on actions allegedly taken on behalf of the defendants in *Maloney* and *Auriemma I*, a third lawsuit, *Auriemma II*, soon appeared. Sixteen of the eighteen *Auriemma I* plaintiffs filed a civil suit against, among others, Montgomery, Hubert, and Investigative Consultants, Inc. (Investigative Consultants). The complaint alleged that Montgomery and Hubert violated the FCRA by hiring Investigative Consultants to obtain credit reports on the plaintiffs from a credit reporting agency through

the use of false pretenses. See 15 U.S.C. § 1681q.[1] According to the complaint, Investigative Consultants then obtained oral and written credit reports on plaintiffs for an unauthorized purpose under the FCRA. See 15 U.S.C. § 1681b.[2] The complaint further alleged that Montgomery

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[1] 15 U.S.C. § 1681q provides:

Obtaining information under false pretenses

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Although § 1681q is a criminal statute, several courts have held that a person may sue for civil damages for violations of that provision. 15 U.S.C. § 1681n allows persons to maintain a cause of action against persons who willfully violate any "requirement" of the FCRA. Because § 1681 is a "requirement" of the FCRA, the courts have reasoned, a person may sue under 15 U.S.C. § 1681n for violation of § 1681q. *See Zamora v. Valley Federal Savings & Loan Ass'n*, 811 F.2d 1368, 1370 (10th Cir. 1987); *Kennedy v. Border City Savings & Loan Ass'n*, 747 F.2d 367, 369 (6th Cir. 1984).

[2] 15 U.S.C. § 1681b provides:

Permissible purposes of consumer reports

A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe—

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(Footnote continued on following page)

and Hubert intended to use the information to embarrass and intimidate the plaintiffs and that the information was, in fact, subsequently disseminated.

Hubert and Montgomery filed a motion to dismiss, contending that even if the complaint's allegations were true, they were absolutely immune from civil liability because the alleged misconduct took place as part of their representation of the City of Chicago and the defendant municipal officials in the *Auriemma I* and *Maloney* suits. The district court denied their motion to dismiss. This appeal followed.[3]

II.
DISCUSSION

Hubert and Montgomery argue on appeal that government attorneys are entitled to absolute immunity from suit for actions taken in preparing and presenting their clients' defense. They contend that public policy requires that they be able to prepare and present the defense of their government clients without the fear of being subjected to lawsuits filed by opposing parties. Plaintiffs contend, however, that public policy does not require granting

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[2] *continued*

> (D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
>
> (E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

[3] The denial of a motion to dismiss is generally not a final appealable order under 28 U.S.C. § 1291. The Supreme Court, however, has held that the denial of a substantial claim of absolute immunity constitutes an appealable "collateral order" under the doctrine enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See Mitchell v. Forsyth*, 472 at 524-25. Thus, we have jurisdiction to hear this appeal.

the defendant attorneys absolute immunity from suit. According to plaintiffs, acquiring information from an extrajudicial source does not constitute the type of "quasi-judicial" function entitled to absolute immunity from suit. Rather, plaintiffs contend, the actions Hubert and Montgomery allegedly took fall within the category of administrative or investigatory acts for which executive officials are only entitled to qualified immunity. As we explain below, the district court correctly denied the defendants' motion to dismiss.

A.

Absolute immunity from civil liability for damages is of a "rare and exceptional character." *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985). Public officials seeking absolute immunity from civil liability bear the burden of showing that overriding considerations of public policy require that they be exempt from personal liability for their alleged unlawful conduct. *See Forrester v. White*, 108 S.Ct. 538, 542 (1988); *Butz v. Economou*, 438 U.S. 478, 506 (1978). To determine whether public policy requires that the actions of particular government officials be immune from suit, the Supreme Court has adopted a functional approach that looks at the nature of the functions an official performs and "the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester*, 108 S.Ct. at 542. This functional approach does not allow for mechanical rules but instead requires the analysis of several factors. Three factors that have been found to be particularly important in determining whether absolute immunity bars a suit are: (1) whether an historical or common law basis exists for granting an official absolute immunity from suit for performing a particular function; (2) whether performing the function poses special risks of vexatious litigation; and (3) whether sufficient safeguards exist to prevent abuses of power. *Mitchell v. Forsyth*, 472 U.S. 511, 521-23 (1985).

Under this approach, the Supreme Court has extended to federal legislation the common law rules granting par-

ticipants in judicial proceedings absolute immunity from civil liability. See *Briscoe v. LaHue*, 460 U.S. 325 (1983) (witnesses); *Stump v. Sparkman*, 435 U.S. 349 (1978) (judges). This extension includes attorneys who appear on behalf of the government. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court held that prosecutors are absolutely immune from liability in suits challenging their decision to initiate criminal prosecutions as well as suits challenging their decisions concerning the conduct of trial and the presentation of evidence. The Court reasoned that the nature of a prosecutor's duties is likely to provoke many retaliatory lawsuits that would hamper the effective functioning of the criminal justice system by discouraging prosecutors from initiating prosecutions and presenting relevant evidence. *Id.* at 424-28. As the Court explained:

> Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence. . . . If prosecutors were hampered in exercising their judgment as to the use of . . . witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence.

Id. at 426. The Court acknowledged that granting absolute immunity does impose a significant cost upon society in that some persons who are genuinely wronged are denied redress for their injuries. Nonetheless, the Court concluded that the broader public interest in the effective functioning of the criminal justice system required that prosecutors perform their duties without fear of having all their decisions relitigated in suits seeking monetary damages against them. *Id.* at 427-28. Moreover, the Court noted that the possibility of criminal sanctions and professional discipline operated to check abuses by overzealous prosecutors. *Id.* at 428-31.

Similarly, in *Butz v. Economou*, 438 U.S. 478 (1978), the Court found that agency officials who initiate administra-

tive proceedings and agency attorneys who present evidence at such proceedings are absolutely immune from suits challenging their actions. Relying on its reasoning in *Imbler v. Pachtman*, the Court determined that absolute immunity was necessary to ensure that agency officials make decisions to initiate proceedings and to present evidence without the fear of being subjected to a suit for monetary damages. The Court expressly rejected arguments that agency attorneys in administrative proceedings were entitled to less protection than prosecutors performing similar functions. The Court pointed out that it was the nature of adjudicative proceedings rather than their location that required granting participants in such proceedings absolute immunity. *Id.* at 512.

> [C]ontroversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another . . . . Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

Id. Furthermore, the Court determined that safeguards in the judicial process such as judicial review and the ability to challenge an opponent's assertions in open court, provide significant protection against abuses by overzealous advocates.

The Supreme Court's reasoning in *Imbler* and *Butz* that absolute immunity is necessary to achieve the independent judgment and vigorous advocacy vital to our adversarial system of justice has been found equally applicable to attorneys *defending* the government in civil litigation. For example, in *Ellison v. Stephens*, 581 F.2d 584 (6th Cir. 1978), the Sixth Circuit held that the Attorney General of Kentucky was absolutely immune from liability in a suit claiming that he violated the plaintiff's rights by asserting an allegedly unconstitutional affirmative defense in an earlier lawsuit filed by the plaintiff. *Cf. Skolnick v. Hanrahan*, 398 F.2d 27 (7th Cir. 1968) (holding that a United States Attorney was immune from liability in a suit alleg-

ing that, by defending various federal defendants in a lawsuit, the attorney aided and abetted the defendants' conspiracy to violate the plaintiff's civil rights).

More recently, in *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986), the Second Circuit held that an Assistant Attorney General defending New York State in a medical malpractice action was absolutely immune from liability in a suit charging that he had participated with federal officials in a conspiracy to "cover up" the federal government's involvement in illegal drug testing. In so holding, the court specifically rejected the plaintiff's argument that government defense counsel were not entitled to absolute immunity because the "passive" nature of their function rendered them less likely to be the target of vexatious suits. According to the court:

> Although government defense counsel, not having selected the other party as the target of the litigation, is in a more passive position than a prosecutor or plaintiff's representative, he nevertheless functions in an adversarial arena where "there is, if not always a winner, at least one loser," [*Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985)], and since he is charged with a public trust he should not be inhibited in the faithful performance of his duties by the threat of harassing lawsuits against him. His function as a government advocate therefore entitles him to absolute immunity, which is "necessary to assure that . . . *advocates* . . . can perform their respective functions without harassment or intimidation." *Butz v. Economou*, [438 U.S. at 512] . . .

798 F.2d at 572 (emphasis supplied in *Barrett*). The court also found support for its holding in the long-standing common law rule that attorneys are absolutely immune from liability for defamatory statements that are reasonably related to the subject matter of ongoing litigation. *Id.* at 572-73 (collecting cases). The rationale behind the common law rule is that the needs of litigants and their advocates in the judicial process require that advocates be able to

vigorously present their clients' cases without having to fear being sued later on for defamation. *Id.*

The fact that government attorneys are entitled to absolute immunity when performing many of the functions of their offices should not, however, be confused with a blanket grant of immunity for government attorneys. Absolute immunity is designed to protect the functions that particular government officials perform, not the government officials themselves. *Compare Stump v. Sparkman*, 435 U.S. 349 (1978) (judges absolutely immune for judicial acts) *with Forrester v. White*, 108 S.Ct. 538 (1988) (judges not absolutely immune from suit for actions taken as part of the administrative functions of their office); *see also Mitchell v. Forsyth*, 472 U.S. at 521-24 (Attorney General not entitled to absolute immunity when performing national security tasks). A government attorney will often perform functions, such as investigative and administrative tasks, that are not intimately associated with the judicial process. When performing these functions the overriding public policy justification of freeing the judicial process from intimidation and harassment no longer exists to justify the costs imposed upon society by absolute immunity. *See, e.g., Barbera v. Smith*, 836 F.2d 96 (2d Cir. 1987) (prosecutor's disclosure of witness' identity that led to witness' death not protected by absolute immunity even if designed to further the future prosecution of the target of the government's investigation), *petition for cert. filed*, 56 U.S.L.W. 3881 (June 28, 1988); *Barrett*, 798 F.2d at 573-78 (federal government attorneys not representing a party to a lawsuit not absolutely immune for engaging in conspiracy to prevent decedent's estate from learning of federal government's involvement in decedent's death). *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979) (prosecutor's involvement in publicity campaign not entitled to absolute immunity), *rev'd in part on other grounds*, 446 U.S. 754 (1980). Therefore, "[i]f the function [is] administrative or investigatory, the official enjoys only qualified immunity." *Henderson v. Lopez*, 790 F.2d 44, 46 (7th Cir. 1986).

Unfortunately, the rule that a government attorney is entitled to absolute immunity when acting in a "quasi-judicial" function but only qualified immunity when acting in an "investigative" or "administrative" role is much more easily stated than applied. The absolute immunity of an advocate is not confined strictly to actions taken in the courtroom, *see, e.g., Barrett*, 798 F.2d at 573, and, at least with regard to prosecutors, the Supreme Court has clearly indicated that absolute immunity may attach to some decisions regarding obtaining, reviewing, and evaluating evidence. *See Imbler*, 424 U.S. at 431 n.33. Yet, investigative activities by attorneys or other executive officials are generally not entitled to absolute immunity. *See, generally, Mitchell v. Forsyth*, 472 U.S. at 521-24 (1985); *Henderson*, 790 F.2d at 46. This is so even though one may safely assume that government officials often expect that the fruits of any such investigation may ultimately end up in court. It is only when such activities are intimately associated with the court-related duties of government attorneys that the activities are entitled to absolute immunity. *See Imbler*, 424 U.S. at 430; *Barbera*, 836 F.2d at 101.

B.

In the present case, the district court correctly concluded that the alleged extra-judicial investigation of plaintiffs was not so intimately associated with the judicial process that public policy requires that the defendant attorneys be absolutely immune from suit. As noted above, the primary reason for granting attorneys absolute immunity is that their unique function as advocates requires that they be able to present their client's case at trial without intimidation or harassment. Although subject to abuses, there are sufficient safeguards in the judicial process to protect litigants from overzealous advocates. These same reasons would also warrant extending absolute immunity to actions taken by advocates within the broad confines of the civil discovery procedures available in both state and federal courts. *Cf. Imbler*, 424 U.S. at 431 n.33 (noting

that the proper performance of the prosecutorial function "may require the obtaining, reviewing, and evaluating of evidence."). Conducting discovery under the rules of civil procedure falls within the unique duties of an advocate and such activities are conducted in the adversarial arena where opposing counsel and the trial court can quickly put the brakes on unethical or unlawful behavior. The same cannot be said, however, for pretrial investigations that occur outside the rules of discovery.

When an attorney in a civil suit steps beyond the rules of discovery to obtain facts in an extra-judicial investigation, he steps into a gray area where his actions start closely resembling those of a police officer or private investigator. Although there is certainly nothing wrong with an attorney conducting extra-judicial investigations, the conduct of such investigations is removed from the judicial process and is not a function that rests uniquely within the duties of an advocate. More important, such investigations take place outside the adversarial arena with its attendant safeguards that provide real and immediate checks to abusive practices. "[T]he judicial process is largely self-correcting: procedural rules, appeals, and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results." *Mitchell v. Forsyth*, 472 U.S. at 522-23. False or unreliable evidence presented at trial is subject to immediate exposure "through cross-examination, rebuttal, or reinterpretation by opposing counsel." *Butz*, 538 U.S. at 516-17. Likewise, the presence of opposing counsel and opposing counsel's ability to seek swift protection from the court serve as substantial checks upon abusive discovery practices. An allegedly unlawful investigation conducted outside the discovery process is not subject to these significant safeguards and protections. While the possibility of criminal prosecution under the FCRA, see 15 U.S.C. § 1681q, professional discipline, or having the trial court exercise its supervisory powers under the "All Writs Act," see 28 U.S.C. § 1651, will certainly act as a deterrent to some unlawful conduct, the likelihood of these sanctions being invoked is speculative at best. This is particularly so given that many, if not

most, extra-judicial investigations will be conducted without the knowledge of the opposing side. Thus, people who are injured by extra-judicial investigations may not know that their rights have been violated, much less know the identity of the persons who violated their rights. Moreover, even if the injured party is aware of all the facts, there is little incentive to invoke these sanctions except in particularly egregious situations.

Hubert and Montgomery nonetheless argue that absolute immunity attaches to their alleged actions because they were related to their duties as defense counsel for their governmental clients. They claim strong support for this argument in the Second Circuit's decision in *Barrett v. United States*, 798 F.2d at 573, where, as noted earlier, the court held that an attorney defending New York State in a medical malpractice action was absolutely immune from a suit claiming that he participated in a conspiracy to suppress evidence of the federal government's involvement in unlawful drug experiments. The Second Circuit's holding in that case, however, is closely analogous to the now well-settled rule that a prosecutor cannot be held personally liable for the knowing suppression of exculpatory information. *See Imbler*, 424 U.S. at 431 n.34; *see also Heidelberg v. Hammer*, 577 F.2d 429, 432 (7th Cir. 1978) (prosecutor absolutely immune from suit claiming that he destroyed and falsified evidence). The rationale for this rule is that prosecutors must be able to exercise their judgment in determining whether to present or not present evidence at trial without having to fear being subject to personal liability for their decisions. *Imbler*, 424 U.S. at 431 n.34. *But see Imbler*, 424 U.S. at 441-45 (White, J., concurring) (arguing that absolute immunity should not be granted when there is suppression of evidence). The factual allegations in the present case, however, do not deal with the same type of situation where an attorney is being sued based on his decision to produce or not produce certain evidence. Rather, plaintiffs seek relief based on alleged unlawful investigative activities which traditionally fall outside the scope of absolute immunity.

Hubert and Montgomery further argue that exposing government attorneys to liability for actions taken in pretrial investigations will stifle their ability to prepare and present their case. We disagree. The absolute immunity granted government attorneys in cases such as *Butz*, *Ellison*, and *Barrett* discussed above gives government attorneys extremely wide latitude in deciding how to conduct their client's case and what evidence to present at trial. Limiting government defense attorneys to qualified immunity when conducting investigations outside the controls of the judicial process in no way diminishes the absolute immunity that attaches to the vital functions they perform that are intimately related to the judicial process. Moreover, even when performing extra-judicial investigations, the existence of qualified immunity allows for a broad range of discretion within which attorneys can operate. All a person need do to avoid personal liability under qualified immunity is to refrain from violating a person's "clearly established statutory or constitutional rights of which a reasonable person would have known." *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This is hardly too much to ask government attorneys when conducting investigations.

Undoubtedly, government defense attorneys may be subject to lawsuits filed by unhappy litigants who resent an attorney's vigorous advocacy. But we fail to see how merely allowing them qualified immunity when performing extra-judicial activities will result in a flood of lawsuits that will significantly detract from the proper performance of their duties. In the first place, the fact that extra-judicial investigations are typically not carried out in the open makes it likely that many real or imagined abuses will not come to the attention of the other side and, thus, not be litigated. *Cf. Mitchell v. Forsyth*, 472 U.S. at 522 (noting that threat of vexatious lawsuits against Attorney General for his participation in national security task is slight because of secret nature of such proceedings). Indeed, defendants have only cited three cases in which government defense counsel have been sued in the last twenty years and none of these cases involved pretrial

investigations of a plaintiff. Moreover, in the limited circumstances where government defense counsel are subject to suit, the existence of qualified immunity and an attorney's ability to obtain sanctions under 28 U.S.C. § 1927 and Fed.R.Civ.P. 11 are powerful antidotes to any litigation abuses. Finally, we note that the threat of exposure to liability is not necessarily a bad thing. After all, suits against public officials are designed to discourage official misconduct as well as to compensate the victims of misconduct. *See Forrester*, 108 S.Ct. at 542.

In sum, we conclude that the defendant government attorneys have failed to satisfy their burden of showing that overriding considerations of public policy require that they be absolutely immune from personal liability for violations of the FCRA while investigating plaintiffs who have brought suit against a ~~governmental~~ entity. "Absolute immunity . . . is 'strong medicine, justified only when the danger of [officials' being deflect[ed from the effective performance of their duties] is very great.' " *Forrester*, 108 S.Ct. at 545 (quoting *Forrester*, 792 F.2d 647, 660 (7th Cir. 1986) (Posner, J., dissenting)). The costs of leaving unlawful conduct unremedied under the circumstances of this case outweigh any potential benefits to be gained by the judicial process by granting such immunity. In so holding, we emphasize that we in no way diminish the absolute immunity traditionally granted government counsel for their participation in the judicial process. We also emphasize that we express no opinion on whether, under similar circumstances, the unique functions performed by prosecuting attorneys would entitle them to greater immunity than that afforded government defense counsel. We merely hold that the conduct alleged in this complaint is sufficiently removed from the judicial process that the government defense attorneys should not be entitled to any greater protection than the qualified immunity to which executive officials are normally entitled. Accordingly, the decision of the district court is

AFFIRMED.

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 21, 1988.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. JESSIE E. ESCHBACH, *Senior Circuit Judge*

JOHN AURIEMMA, et al.,

Plaintiffs-Appellees,

No. 88-1072 vs.

JAMES MONTGOMERY and DONALD HUBERT,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 9260—**Harry D. Leinenweber,** *Judge.*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 1, 1988.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. JESSIE E. ESCHBACH, *Senior Circuit Judge*

JOHN AURIEMMA, et al.,

Plaintiffs-Appellees,

No. 88-1072 v.

JAMES MONTGOMERY and DONALD HUBERT,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 9260—**Harry D. Leinenweber**, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by Defendants-Appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86C9260 Date: DECEMBER 23, 1987

Name of Assigned Judge: JUDGE LEINENWEBER

Case Title: WILLIAM M. MALONEY, Plaintiff, vs. FRED RICE, et al., Defendants.

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

(a) Defendants.
(b) MOTION TO SUBSTITUTE COUNSEL

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Locke E. Bowman is granted leave to substitute as counsel for defendants' Rice and City of Chicago/James Montgomery. Defendants' motion to dismiss is denied. Defendants' motion to stay discovery is allowed. Defendants' to file its answer to the amended complaint by January 4, 1988.

(3) ☒ Filed motion of [use listing in "MOTION" box above].

* * * * *